Supreme Court, U.S.
FILED

99 738 SEP 22 1999

OFFICE OF THE CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1999

H. EVEREST WILHELMSEN,
Petitioner,

v.

MURRAY R. WALSH, BILL CORBUS, JOHAN DYBDAHL, ALBERT CLOUGH, GABRIALLE LAROCHE, ROSEMARY HAGEVIG, BOYD G. BROWNFIELD, CHUCK ACHBERGER, MIKE BAVARD, JOHN MACKINNON, RALPH KIBBY, STEVEN GILBERTSON, KEVIN G. MEYER, ROBIN HEINRICHS, BETH KERTTULA, DAVID WEINGARTNER, MARK PALESH, DONALD CHENHALL, KRISTEN BOMENGEN, SCOTT NOVAK, JOHN R. CORSO, BYRON MALLOTT, CHARLES EADDY, ELLEN FRITTS, DENNIS EGAN, DWIGHT PERKINS, CHARLES NORTHRIP, GRETCHEN KEISER, DIANE MAYER, STEPHEN WHITE, LAMAR COTTEN, STEPHEN SORENSEN, BETTY GLICK, KARI WESTLUND, TOM GARRETT, KIRBY DAY, CITY & BOROUGH OF JUNEAU, STATE OF ALASKA,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
FROM THE SUPREME COURT OF ALASKA

PETITION FOR WRIT OF CERTIORARI

BY: H. Everest Wilhelmsen

H. Everest Wilhelmsen
Plaintiff Pro Se of Record
P.O. Box 22547
Juneau, Alaska 99802
(907) 586-2622 Message

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I. QUESTIONS PRESENTED FOR REVIEW.

1. May government employees and officials responsible to implement the coastal zone management program knowingly and routinely violate implementation requirements when issuing leases and development permits, (i.e., violate "enforceable policies" and purposes of the federal Coastal Zone Management Act of 1972 as amended by P.L. 101-508, November 1990, and P.L. 104-150, the Coastal Zone Protection Act of 1996)?

2. May a state's administrative employees or officials willfully and routinely refuse to consider properly presented written and oral comments during consistency review petitions that show these unwarranted favors: additionally violating federal implementation requirements by making arbitrary determinations and simultaneously violating rights that rely solely upon obeyance and enforcement of the program?

3. May a state also deny petitioners rights to fair reviews before the Superior Court (until it is too late) by filing motions to dismiss rather than automatically converting actions for injunctive relief and subsequent actions for declaratory relief and damages into administrative appeals when actions for damages result from an administrative order and seek the exact same review as an administrative appeal?

II. ADMINISTRATIVE ORDER AND OPINIONS.

a. On April 26, 1995 an Alaska Superior Court denied petitioner's first request for a temporary restraining order.

b. On April 27, 1995 the State of Alaska Division of Governmental Coordination issued an administrative order (Final Consistency Determination for Mt. Roberts Development Corporation's proposed project).

c. On October 28, 1995 the Alaska Superior Court denied petitioner's second request for a temporary restraining order. Petitioner's Motion for Reconsideration was denied.

d. On December 26, 1999 the Superior Court dismissed petitioner's amended complaint that included a claim for damages and petitioner's Motion for Reconsideration was denied.

e. On May 26, 1999 the Supreme Court of Alaska in MEMORANDUM OPINION AND JUDGMENT No. 0924 affirmed the Superior Court's dismissal of the amended complaint and petitioner's Petition for Rehearing was then denied.

III. JURISDICTION.

The decision of the Alaska Superior Court to dismiss petitioner's amended complaint was entered on December 26, 1996. On appeal, the Supreme Court of Alaska's MEMORANDUM OPINION AND JUDGMENT No. 0924 was entered on May 26, 1999 and petitioner's Petition for Rehearing was denied on June 24, 1999.

Jurisdiction comes under Rule 10 of the United States Supreme Court Rules of Appellate Procedure and this petition is timely filed under Supreme Court Rule 13.

IV. FEDERAL AND CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED.

The federal Coastal Zone Management Act of 1972 as amended by P.L. 101-508, November 1990, and P.L. 104-150, the Coastal Zone Protection Act of 1996, § 303 (16 U.S.C. § 1452), Congressional Declaration of Policies; Article VIII, Section 10 of the Constitution of Alaska, that prohibits disposals of state land, or interests therein, "without prior public notice and other safeguards of the public interest that may be prescribed by law."

V. STATEMENT OF THE CASE AND BASIS FOR JURISDICTION IN COURT OF FIRST INSTANCE.

This case involves violations of implementation requirements and purposes of the coastal zone management program, including citizen's rights to fair hearings when they stand in protection of this country's coastal areas and other rights that are simultaneously violated and rely solely upon obeyance and enforcement of the program.

H. Everest Wilhelmsen, as an effected citizen in his coastal district, was a participant in a Consistency Review process with the State of Alaska Division of Governmental Coordination ("DGC") regarding a proposed development project. Mr. Wilhelmsen properly presented his written comments to DGC during the process because he was concerned about numerous violations of implementation regulations of the coastal program that were committed specifically for the proposed project and were unreasonably denying him and others fair opportunity and rights to competitively bid for a 70 year lease of very valuable waterfront property.

Mr. Wilhelmsen also filed a petition regarding a Proposed Consistency Determination he had received from DGC for Mt. Roberts Development Corporation's proposed project because it appeared to him that DGC had not considered his comments on violations of implementation regulations committed specifically for Mt. Roberts Development Corporation. These are violations of public notice, land use, and land management regulations that federal and State of Alaska law requires to be properly administered, but this is not how it is done by local and state authorities in the City and Borough of Juneau ("CBJ").

At the very beginning of the hearing before the Coastal Policy Council, the Director of DGC, Diane Mayer, (who was at the time also a member of the Council), and a State's Assistant Attorney General representing DGC began arguing that Mr. Wilhelmsen not be allowed to speak regarding implementation violations. Mr. Wilhelmsen argued back on his own behalf (as an effected citizen) that he filed his petition under Alaska Statute 46. 40.100(b) which allows him to speak about implementation violations that are specific to a proposed project and that he should be allowed to speak freely on any subject pertaining to DGC's Proposed Consistency Determination for the project.

In short, Diane Mayer thoroughly convinced the Coastal Policy Council to do as she pleased (even though she took part in issuing the Proposed Consistency Determination) and the Council would not consider the implementation violations Mr. Wilhelmsen brought to their attention prior to instructing DGC to issue the Final Consistency Determination and state permits to Mt. Roberts Development Corporation for the proposed project.

These issues were brought forward at every juncture. When Mr. Wilhelmsen requested injunctive relief to stop DGC's issuance of the administrative order, the Superior Court ruled that his "complaint does not allege the irreparable harm that is required by Civil Rule 65." When later requesting injunctive relief to stop construction, the Court again asked him to show irreparable harm and also asked for a 5 million dollar bond requested by Mt. Roberts Development Corporation.

It was five months after the 18 million dollar project was completed that the Court dismissed Mr. Wilhelmsen's complaint based upon defendants' claim of immunity. It was also at this time that the Court ruled that Mr. Wilhelmsen be allowed to refile his complaint as an administrative appeal before the Court and Mt. Roberts Development Corporation then sold its interests in the 70 year lease and project to a partner (limited partnership).

The Supreme Court of Alaska chose to not consider "immunity" and after receiving supplemental briefing determined that defendants owed no actionable duty to Mr. Wilhelmsen, though the state was not sued for damages, but for injunctive and declaratory relief. Mr. Wilhelmsen believes he has been deprived of a number of fair hearings at this point and he prays the United States Supreme Court will bring justice into this case. If not for himself, for the public's best interests.

Respectfully submitted this 22nd day of September, 1999.

H. Everest Wilhelmsen
Plaintiff Pro Se

Supreme Court, U.S.
FILED

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1999

H. EVEREST WILHELMSEN,
Petitioner,

v.

MURRAY R. WALSH, BILL CORBUS, JOHAN DYBDAHL, ALBERT CLOUGH, GABRIALLE LAROCHE, ROSEMARY HAGEVIG, BOYD G. BROWNFIELD, CHUCK ACHBERGER, MIKE BAVARD, JOHN MACKINNON, RALPH KIBBY, STEVEN GILBERTSON, KEVIN G. MEYER, ROBIN HEINRICHS, BETH KERTTULA, DAVID WEINGARTNER, MARK PALESH, DONALD CHENHALL, KRISTEN BOMENGEN, SCOTT NOVAK, JOHN R. CORSO, BYRON MALLOTT, CHARLES EADDY, ELLEN FRITTS, DENNIS EGAN, DWIGHT PERKINS, CHARLES NORTHRIP, GRETCHEN KEISER, DIANE MAYER, STEPHEN WHITE, LAMAR COTTEN, STEPHEN SORENSEN, BETTY GLICK, KARI WESTLUND, TOM GARRETT, KIRBY DAY, CITY & BOROUGH OF JUNEAU, STATE OF ALASKA,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
FROM THE SUPREME COURT OF ALASKA

PETITIONER'S APPENDIX

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FIRST JUDICIAL DISTRICT AT JUNEAU

H. EVEREST WILHELMSEN and BARRY C. WINK, Plaintiffs, vs. STATE OF ALASKA, Defendant.	FILED IN CHAMBERS, STATE OF ALASKA FIRST JUDICIAL DISTRICT AT JUNEAU 4/26/95

Case No. 1JU-95-880CI

MEMORANDUM AND ORDER

This case is filed by the plaintiffs pro se requesting a declaratory judgment and temporary restraining order. The case is assigned to Judge Walter L. Carpeneti. It is being decided by this court at this time as there is a request for expedited consideration and a request to halt a hearing that is to take place at 3:00 p.m. today and the case was filed at 2:37 p.m. Judge Carpeneti is unavailable.[1]

The motion for temporary restraining order is denied. The complaint does not allege the irreparable harm that is required by Civil Rule 65.[2] The request is

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[1] Civil Rule 42 allows the presiding judge to assign another judge to decide a case that is assigned to a judge that is unavailable.

[2] That rule provides in part:

(b) Temporary Restraining Order--Notice--Hearing--Duration. A temporary

to prevent a meeting and the possible issuance of permits at a meeting of the Coastal Policy Council. The plaintiffs may take what action they deem appropriate if permits are issued in an illegal way or for illegal purposes. The matter is referred back to Judge Carpeneti for all further proceedings.

Dated April 26, 1995

"s/ Larry Weeks"

Larry Weeks
Superior Court Judge

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restraining order may be granted without written or oral notice to the adverse party or that party's attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the claim that notice should not be required. Every temporary restraining order granted without notice shall be endorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to

exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if the party does not do so, the court shall dissolve the temporary restraining order. On two days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

STATE OF ALASKA
Office of the Governor, Tony Knowles
Office of Management and Budget Division of Governmental Coordination
P.O. Box 110030
Juneau, Alaska 99811-0300
PH: (907) 465-3562/FAX: (907) 465-3075

April 27, 1995

Mr. John Heiser
Mount Roberts Development Corp.
P.O. Box 22470
Juneau, AK 99802

Dear Mr. Heiser:

SUBJECT: MOUNT ROBERTS TRAMWAY
STATE I.D. NO. AK9501-13JJ
FINAL CONSISTENCY DETERMINATION

The Division of Governmental Coordination has completed coordinating the State's review of Mount Roberts Development Corporation's (MRDC) proposed project for consistency with the Alaska Coastal Mangement Program (ACMP). As the Juneau Coastal Management Program (JCMP) is incorporated in the ACMP, the proposed project has also been evaluated for consistency with the JCMP. A proposed consistency determination was issued on March 22, 1995. This determination is based on review participants' comments and all applicable coastal standards.

Project Description

The project is construction of a double reversible jig-back aerial tramway with two 60-passenger cars traveling from a base terminal at the existing cruiseship

dock on South Franklin St. to the 1760 foot-level of Mount Roberts (the northern ride).[1] MRDC anticipates leasing approximately 10,000 square feet of CBJ land for the base terminal. The base terminal will include the tram drive equipment, ticketing outlet, queuing area, foot storage, public restrooms, and administrative offices for MRDC. The cruiseship dock will continue to be used for cruiseship and ferry docking. Parking, bus staging and the public plaza will be upgraded (paving, curbing, and landscaping) bt MRDC according to CBJ requirements. Public parking at the base terminal will be at the Columbia Lot, with at least 48 spaces for automobiles, 5 bus spaces, an area for vans and taxis, and a turn-around area for municipal buses if necessary. Tram employees will park offsite on private property (at the "rock dump") where 50 spaces for automobiles will be provided. The rock dump will also provide overflow parking. Those parking at the rock dump will take a shuttle van to the base terminal. Supply deliveries at the base terminal will occur at non-peak hours to avoid interference with public parking, public access, and tram operations.

The upper terminal will encompass approximately 20,000 square feet of privately-owned land and will contain a 250-seating capacity restaurant, an amphitheater for video and audio presentations, and retail space. The upper terminal building will

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[1] See CBJ Memorandum to the Planning Commission dated 2/24/95, p.1, for the legal description of the base and upper terminal sites.

be an alpine lodge utilizing existing tree cover and terrain features to blend with the surroundings. The building will be designed to meet all applicable building codes and to withstand winds of 120 mph. A weather reporting station will be installed at the upper terminal. The tram will not be operated in cross winds greater than 60 mph.

The area surrounding the upper terminal will be developed to include interpretive displays, viewing platforms and a trail system connecting to the existing Mount Roberts trail. A 1200-foot section of the existing Mount Roberts trail will be re-routed and connecting trails will be established. MRDC has agreed to follow the recommendations of the Juneau State Parks Advisory Board (conveyed in the Department of Natural Resources consistency comments dated March 8) in designing and maintaining the trail system. However, the CBJ conditional use permit, which is not subject to State consistency review, requires MRDC to comply with the State Parks Advisory Board's recommendations. The recommendations adopted by MRDC are:

1. Re-route trail. MRDC will obtain approval for the location and design of the re-routed Mount Roberts Trail from DNR, Division of Parks and Outdoor Recreation. This shall be called the "bypass" trail, and where located on private tramway lands, the bypass trail shall be re-dedicated in perpetuity to DNR to replace the existing, impacted trail route. The bypass trail will be situated to avoid other heavily-used trails associated with the tramway traffic

wherever possible. The bypass trail shall be open to the public during all phases of construction, except during brief periods if blasting is required during construction of the upper terminal.

2. Terminal to cross trail. MRDC shall rehabilitate or reconstruct the existing trail from the upper terminal to the cross to carry up to 2,000 people per day or whatever the design capacity of the tram may be. The trail should be hardened and with a grade of 12% or less.

3. Retain hemlock. MRDC shall avoid cutting or constructing any trail structure or viewing platforms over mountain hemlock or the fringe of the meadow when emerging from the forest environment.

4. Lower trail upgrade. MRDC will contribute ½ the cost of bringing the Mount Roberts trail below the upper terminal up to a standard of 12% grade or less and a 4 foot width. Contributions may be in-kind services of transportation, staff, materials, or cash payments to a nonprofit organization created for this purpose to equal up to $50,000 in value.

5. Trail maintenance. MRDC shall contribute ½ the cost of maintenance of the entire Mount Roberts trail above the upper terminal site. Contributions may be in kind services of transportation, staff, materials, or cash payments to a non-profit organization created for this purpose to equal up to $25,000 in value per year.

Interpretive displays will include information about the surrounding environment and information to educate visitors about minimizing impacts to alpine habitat and reducing the possibility of negative human/bear interactions. MRDC will work with DNR, Division of Parks and Outdoor Recreation, DFG and other resource experts in designing the interpretative displays.

The tram cables will cross over State and private lands. MRDC applied for a right-of-way from DNR for a parcel of State land approximately 1,025 ft. long and 100 ft. wide. Along the cable alignment from the 800 ft. to 1300 ft. elevation (approximately 1110 ft. in length), some tree topping is required. On February 22, MRDC submitted additional information on topographic and profile data, which addressed tree topping, including a photograph with the alignment depicted to demonstrate the approximate number of trees to be topped. Also, on February 23, MRDC submitted a preliminary tree management plan which included measures for minimizing potential impacts from geophysical hazards. A final tree management plan was submitted in April 1995. These measures are incorporated, by reference, as part of the detailed description of the project.

Infrastructure for the tramway will consist of a utilidor for drinking water and waste water systems and electrical and telecommunications lines. The utilidor (pipeline) will contain conduits for utilities and will extend from the upper terminal to private property at the base of Mount Roberts where the utilidor will connect to existing utilities. The utilidor will be installed above ground, attached to bedrock with rock bolts and utilizing tree cover to minimize visual

use of overhead drive system eliminates the need for excavation below mean high water. However, any water accumulated in the excavation area will be removed and disposed of using standard construction techniques. The base terminal construction site will be fenced in for public safety reasons. Staging for equipment and supplies required for construction of the base and upper terminals will take place at the rock dump and on State and private lands at the upper terminal site.

The tram will operate from January 15 to October 15, closing only for maintenance and repairs. Daily hours of operation will increase during the peak tourist season. Further details about the tramway are discussed in the information packet submitted for the State's coastal consistency review.

Consistency Determination.
This final consistency determination applies to the following State authorizations as per 6 AAC 50:

Alaska Department of Natural Resources

Temporary Land Use Permit
LAS #19371

Purpose: Temporary helipad, access route and staging of construction materials and equipment on State lands at the upper terminal site.

Temporary Water Use Permit
SE #95-3

Purpose: Temporary use of water from a runoff stream during construction of the upper terminal.

Water Right LAS #19392

Purpose: A well for an alternative drinking water supply, at the upper terminal.

Right-of-Way (Easement)
ADL #106072

Purpose: Air rights across State lands along the tram route.

Originally, MRDC applied for a wastewater disposal permit from the Department of Environmental Conservation (DEC) as a contingency measure should wastewater discharge at the upper terminal site be chosen as an alternative. During the review, the utilidor alternative was selected, which does not require a wastewater disposal permit.

Based on the review of MRDC's project by the Alaska Departments of Environmental Conservation (DEC), Fish and Game (DFG), and Natural Resources (DNR) and the Juneau coastal district (CBJ), the State concurs with MRDC's certification that the project is consistent with the ACMP.

Advisories
Please be advised that DEC's coastal consistency comments include a number of advisories for MRDC. DEC's comments were mailed to you previously; please refer to them for DEC's advisories. In addition, DGC and DEC remind MRDC that drinking water and waste water plan approvals must be obtained. Plan approvals are not subject to coastal consistency review. Please contact the Juneau District Office at 465-5350 for more information.

This office notes that both the DNR right-of-way and the CBJ conditional use permit

will carry a stipulation requiring MRDC to submit a detailed, final tree management plan. This office received a copy of the document in April. The document provides site-specific detail of the application of the measures previously provided in response to concerns about erosion which could potentially result from the necessary tree trimming activities. Thank you for sending DGC a copy of the final tree management plan for our files.

As you know, this office received public comments on the tramway project. All public comments were mailed to you previously. For your information DGC's response to public comments was enclosed with the proposed consistency determination.

Please be advised that although the State has found the project consistent with the ACMP and JCMP, based on MRDC's information packet and project description and any stipulations contained herein, MRDC is still required to meet all applicable local, state and federal laws and regulations. This consistency determination may include reference to specific laws and regulations, but this in no way precludes MRDC's responsibility to comply with other applicable laws and regulations.

If changes to the approved project are proposed prior to or during its siting, construction, or operation, MRDC is required to contact this office immediately to determine if further review and approval of the revised project is necessary. If the actual use differs from the approved use contained in the project description, the State may amend the State approvals listed in this consistency determination.

This consistency determination does not obligate DNR to issue authorization under AS 38.05 or AS 46.15 nor does it supersede the statutory obligations thereunder. MRDC may not proceed with any uses of State land or water until authorized by DNR.

By Copy of this letter, this office is informing review participants of the State's final consistency determination.

If you have any questions regarding the consistency review process or this determination, please contact this office at 465-3562.

Sincerely,

"s/ Christine Valentine"

Christine Valentine
Project Review Coordinator

cc: Mount Roberts Tramway Distribution List

n:/close/tram.fin

MOUNT ROBERTS TRAMWAY DISTRIBUTION LIST
State ID #AK9501-13JJ

Sally Schlichting, DEC, Juneau
Lana Shea, DFG, Juneau
Janet Schempf, DFG, Juneau
Van Sundberg, DOT/PF, Juneau
Mike McKinnon, DOT/PF, Juneau
Elizaveta Shadura/Terry Rader, DNR, Juneau
John Dunker, DNR/DOW, Juneau
Bill Garry, DNR/DPOR, Juneau
Judith Bittner, DNR/SHPO, Anchorage

Jan Caulfield/Murray Walsh, Community Development, CBJ
Page Bridges, Juneau
Cristi Herren, Juneau
Chuck Keen, Juneau
Laurence Mahnke, Juneau
Laura Stats, Juneau
Everest Wilhelmsen, Juneau
Barry Wink, Juneau
John Heiser, Applicant, Juneau
Kate Tesar, AK Services Group, Juneau
David Crosby, Attorney, Juneau
Greg Cook, Attorney, Juneau

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FIRST JUDICIAL DISTRICT AT JUNEAU

H. EVEREST WILHELMSEN and BARRY C. WINK, Plaintiffs, v. STATE OF ALASKA, Defendant.	FILED IN CHAMBERS, STATE OF ALASKA FIRST JUDICIAL DISTRICT AT JUNEAU 4/26/95 BY: "s/ AW"

Case No. 1JU-95-880CI

ORDER

Introduction

This is an action for a temporary restraining order, brought under City and Borough of Juneau Code 49.10.610 (1988). The issuance of preliminary injunctions and temporary restraining orders is governed by Alaska Civil Rule 65.

That rule and the case law developed by the supreme court require that injunctive relief may not be granted unless the moving party shows (1) that it is likely to succeed on the merits or has raised a serious and substantial question, (2) that irreparable harm will be suffered by the moving party or that the balance of hardships favors the moving party, and (3) adequate security has been posted by the moving party to cover any loss occasioned by the granting of injunctive relief, in the event that it develops that the relief should not have been granted.

1. Success on the Merits/Serious and Substantial Question

Because both the second and third issues are determinative of the request for injunctive relief, it is not necessary to reach this issue. For this reason, the court assumes without deciding that the plaintiff has at least raised seriour and substantial questions regarding the permits involved in this case.

2. Irreparable Injury/Balance of Hardships.

At the outset, plaintiff argues that he need not show irreparable injury because CBJ 49.10.610 excuses it in cases where a violation of city permit or approval has been shown. The ordinance in question reads as follows:

> INJUNCTIONS. The superior court has jurisdiction to enjoin a violation of this title or of a lawful order of the department or permit, approval or term or condition of a permit, or approval issued under this title. In actions brought under this section, temporary or preliminary relief may be obtained upon a showing of imminent threat of continued violation, and probable success on the merits, without the necessity of demonstrating physical irreparable harm. The balance of equities in actions under this section may affect the timing of compliance, but not the necessity of compliance within a reasonable period of time.

CBJ 49.10.610.

A review of the entire statutory section in which this provision is found, as well as the placement of the provision, convinces the court that, even assuming that the provision is valid in purporting to excuse a party from the requirements of Civil Rule 65 and the case law developed by the supreme court[1], it does not apply to private litigants attempting to enjoin a project which has received approval from the municipal authorities. The entire premise of the "Enforcement" article is that "the department" has found a situation which, in its judgment presents "imminent or present danger to the health, safety, or welfare of the people of the municipality". CBJ 49.10.600. The immediately following section, section 610, must be read in conjunction with the entire article. The court concludes that the section in question is not available to a private plaintiff who, at bottom, presents nothing more than his sincere belief that the city agencies have erred in their interpretation of city law.

Plaintiff must therefore show that he stands to suffer irreparable harm if

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[1] The court entertains grave concerns about the validity of a city ordinance which purports to excuse the city from a requirement of state law in instances where the city seeks injunctive relief. However, that issue is not now before the court and the court accordingly renders no decision on it. For purposes of this decision, the court assumes the validity of the ordinance and addresses only the question whether it applies to the plaintiff so that the plaintiff may claim its benefit.

injunctive relief is not granted. He has not done so.[2] In these circumstances, injunctive relief must be denied.

3. Security

Civil Rule 65(c) provides:

> No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

The CBJ has introduced evidence in this case demonstrating that the Mount Roberts tram is approximately a ten million dollar project, with two million dollars already expended, which currently employs about 35 people. Evidence was adduced showing that construction is in full swing in an effort to close in structures before winter weather brings a halt to outside work. The CBJ estimates that a halt in construction would delay the project so that it could not meet a 1996 opening date, costing the city at least $35,000 in lost fees ($30,000) and in staff time to deal with resulting bus scheduling problems ($5,000). Opposition at 3, citing Exhibit 1, Palmer affidavit. In addition, the Mt. Roberts Tramway Limited Partnership has claimed potential losses

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[2] Indeed, plaintiff has argued that he does not have to do so under CBJ 49.10.610.

in the millions of dollars, and has requested a $5,000,000 bond. Opposition Exhibit 2, Heiser affidavit. The CBJ and the partnership both stand to suffer substantial harm if an injunction were to be wrongfully issued in this case.[3]

The rule requires security from the plaintiff in such cases to ensure that, in case an injunction turns out to have been wrongfully issued, the defendant is not harmed. The relevant determinant of the requisite security is the measure of defendant's potential damages. Although the court has some discretion in setting the amount of security required ("in such sum as the court deems proper"), the security must nonetheless be adequate to cover costs and damages of the party who may be wrongfully enjoined, regardless of the financial status of the plaintiff. In this case Mr. Wilhelmsen has indicated that he could not post a bond (written submission) or a substantial bond (oral argument). The court does not believe that the question of the amount of the bond is properly reached, plaintiff having lost on the question of irreparable harm/balance of hardships, but it should be noted that the plaintiff has already conceded that he could not post a substantial bond, and it is clear that substantial bond would be required if the

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[3] Although Mt. Roberts Tramway Limited Partnership has not been joined as a party to this action, joiner would probably be required under Civil Rule 19. Therefore, the court has considered the Heiser affidavit in evaluating this request for a temporary injunction.

plaintiff had prevailed on the first two issues.

Conclusion

For the above reasons, the motion for a temporary restraining order is DENIED.

IT IS SO ORDERED.

DONE at Juneau, Alaska this 28th day of October, 1995.

"s/ Walter L. Carpeneti"

WALTER L. CARPENETI
Superior Court Judge

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FIRST JUDICIAL DISTRICT AT JUNEAU

H. EVEREST WILHELMSEN, Plaintiff, vs MURRAY R. WALSH, BILL CORBUS, JOHAN DYBDAHL, ALBERT CLOUGH, GABRIALLE LAROCHE, ROSEMARY HAGEVIG, BOYD G. BROWNFIELD, CHUCK ACHBERGER, MIKE BAVARD, JOHN MACKINNON, RALPH KIBBY, STEVEN GILBERTSON, KEVIN G. MEYER, ROBIN HEINRICHS, BETH KERTTULA, DAVID WEINGARTNER, MARK PALESH, DONALD CHENHALL, KRISTEN BOMENGEN, SCOTT NOVAK, JOHN R. CORSO, BYRON MALLOTT, CHARLES EADDY, ELLEN FRITTS, DENNIS EGAN, DWIGHT PERKINS, CHARLES NORTHRIP, GRETCHEN KEISER, DIANE MAYER, STEPHEN WHITE, LAMAR COTTEN, STEPHEN SORENSEN, BETTY GLICK, KARI WESTLUND, TOM GARRETT, KIRBY DAY, CITY & BOROUGH OF JUNEAU, STATE OF ALASKA, Defendants. Case No. 1JU-95-880CI	FILED IN CHAMBERS STATE OF ALASKA FIRST JUDICIAL DISTRICT AT JUNEAU 12/26/96 BY: "s/ MA"

SUMMARY ORDER

Plaintiff H. Everest Wilhelmsen (Wilhelmsen) has brought this action against the City and Borough of Juneau (CBJ), the State of Alaska, and numerous individuals connected with either the State or CBJ. Wilhelmsen challenges the legality of the

process employed in granting Mt. Roberts Development Corporation (MRDC) its lease and permits to construct the Mt. Roberts tram.

CBJ now moves the court to dismiss the complaint against the individual CBJ defendants[1] for failure to state a claim upon which relief can be granted under Civil Rule 12(b). CBJ bases this argument on statutory and common law immunity.

The state also moves the court to dismiss the claims of individual defendants on immunity grounds. Additionally, the state moves to dismiss the amended complaint on a number of procedural grounds, including failure to join an indispensable party (Civil Rule 12(b)(7)), failure to state a claim (Civil Rule 12(b)(6)), failure to file as an administrative appeal (Civil Rule 12(c)), failure to file a short and plain complaint (Civil Rule 8), and improper service (Civil Rule 4(j)).

After careful review of all the pleadings, and for the reasons set out below, the court dismisses with prejudice the claims against all of the individual CBJ defendants.[2] The court dismisses with prejudice the claims against the individual state defendants. Additionally, the court dismisses without prejudice Wilhelmsen's complaint against the State of Alaska with leave to refile in accordance with this order.

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[1] Defendant William Corbus has filed his own motion to be dismissed as a defendant. The court decides that motion in a separate order.

[2] This order doew not apply to Defendant William Corbus.

The Individual CBJ Defendants

Wilhelmsen claims that CBJ and certain CBJ employees and officials violated CBJ Municipal Code in granting "unwarranted treatment, advantage, and benefits (lease. . .) to" MRDC. Amended Complaint at 2, ¶ 1. He also claims that CBJ violated his equal protection rights by not opening the property it leased to MRDC to bids or proposals from others, and that CBJ and the CBJ defendants violated his procedural and substantive due process rights. Amended Complaint at 2, ¶¶ 3-4. Wilhelmsen asserts these claims under 42 U.S.C. § 1983. The individual CBJ defendants move to dismiss the claims against them on multiple theories.

The individual CBJ defendants are immune from this action, and therefore must be dismissed as defendants. The basis for this finding of immunity is AS 09.65.070(d)(2-3).[3] That statute provides:

> (d) An action for damages may not be brought against a municipality or any of its agents, officers, or employees if the claim
>
> > (2) is based upon the exercise or performance or the failure to exercise or perform a discretionary function

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[3] CBJ argues that common law immunity as discussed in Breck v. Ulmer, 745 P.2d 66 (Alaska 1987) constitutes another ground for dismissal. Because the court decides the issue of dismissal of CBJ and the individual CBJ defendants under AS 09.65.070, it need not reach the question of common law immunity.

> or duty by a municipality or its agents, officers, or employees, whether or not the discretion involved is abused.
>
> (3) is based upon the grant, issuance, refusal, suspension, delay, or denial of a license, permit, appeal, approval, exception, variance, or other entitlement, or a rezoning. . . .

Wilhelmsen is suing both the CBJ and certain individuals who work for the CBJ or serve on various of its boards and commissions. (These persons are referred to as "the individual CBJ defendants.") The CBJ is sued for the actions which its various entities took.[4] The individuals are sued for their official performance on the Waterfront Committee, the Planning Commission, the Assembly, and as CBJ staff. The claims against the individuals must fail under this statute, for the statute provides that no action may be brought against the municipality's employees for discretionary acts (even if the discretion was abused).

Those individuals who were on the Waterfront Committee[5] played a purely advisory role. To advise, one must deliberate, decide, and/or judge -- acts which the supreme court has said are discretionary. Breck v. Ulmer, 745 P.2d 66, 73 (Alaska 1987).

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[4] The CBj has not moved to dismiss the action filed against the CBJ itself. It has moved here only for dismissal of the action against the individual CBJ defendants.

[5] Chuck Achberger, Kirby Day, Gabrielle Laroche, Charles Northrip, and Kari Westlund.

Discretionary acts are squarely under the purview of AS 09.65.070(d). These persons are therefore immune from this suit and the action against them must be dismissed.

Those individuals who served on the Planning Commission[6] also fall under the statute's purview. Their role in relationship to MRDC was to adopt findings and take a vote, actions undertaken in their official capacity as commission members. The acts of adopting and voting are discretionary, and thus explicitly protected from this type of suit by AS 09.65.070. For this reason, the individual Planning Commission defendants are immune from suit and the action against them must be dismissed.

In addition, the individual defendants who were members of the Assembly[7] share the protection of the immunity statute. They made a recommendation for action (the Assembly Lands Committee recommended ordinances (Complaint ¶¶ 215, 256), acts which are deliberative and administrative, and which thus allow the actors immunity under AS 09.65.070. Accordingly, the individual defendant Assembly members enjoy immunity and the action against them must be dismissed because their acts were discretionary.

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[6] Mike Bavard, Kristen Bomengen, Johan Dybdahl, Charles Eaddy, and Stephen Sorenson.

[7] Albert Clough, Dennis Egan, Tom Garrett, Rosemary Hagevig, Ralph Kibby, John MacKinnon, Byron Mallott, and Dwight Perkins.

The final group of CBJ defendants were not members of a deliberative body, but were employees of CBJ.[8] This, however, changes neither the analysis nor the result. The acts of these individual defendants involved advising, negotiating, and interpreting. These acts require deliberation, decision, and judgment, and were undertaken in the actors' official capacities. As such, they were discretionary under AS 09.65.070(d)(2). The individual CBJ employee defendants are therefore immune to the extent that their acts were discretionary.

Accordingly, insofar as the individual CBJ defendants are being sued for their official, discretionary acts, any claim based on those acts must fall under AS 09.65.070(d)(2-3). Those defendants are immune from suit based on those acts,[9] and the claims based on those acts must be dismissed on the ground that no relief can be granted.[10]

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[8] John Corso, Steven Gilbertson, Mark Palesh, and Murray Walsh.

[9] As noted above, the statute under which relief is granted appears to apply equally to the municipality itself ("An action for damages may not be brought against a municipality or any of its agents . . ."). (Emphasis added.)). Nonetheless, the CBJ has not moved to dismiss the complaint against itself, but only against the individual defendants. In these circumstances, the court limits the relief to that which is sought: dismissal of the suit against the individual CBJ defendants.

[10] All of this is not to say that the acts complained of are entirely beyond the

Individual State of Alaska Defendants

Wilhelmsen's claims against the individual state defendants[11] in their official and personal capacities are based upon the

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scope of judicial review. An agrieved citizen can seek judicial review of administrative actions with which the citizen disagrees. However, such review -- an appeal of administrative action -- must be brought within narrow time limits. An appeal must be brought within thirty days of the Assembly's final action. Alaska Rule of Appellate procedure 602(a)(2).

Even treating this case as an appeal of administrative action, it does not appear that the case was brought within that time. (The Assembly's Decision on Appeal was issued June 12, 1995. Wilhelmsen's Amended Complaint, which was plaintiff's first complaint against CBJ action was not filed until October 3, 1995.) If it was not brought within the required time, it would be subject to dismissal. Haynes v. State Dept. of Natural Resources, 742 P.2d 253 (Alaska 1987); Kollodge v. State, 757 P.2d 1028 (Alaska 1988).

However, because that issue has not been raised or briefed by the parties, this court declines to reach it here.

The court also takes the opportunity to note that the scope of a court's review of the actions of an administrative body is very limited. See generally AS 44.62.

[11] They include Diane Mayer, Gretchen Keiser, David Weingartner, Stephen White, Boyd Brownfield, Donald Chenhall, Lamar Cotten, Ellen Fritts, Betty Glick, Robin Heinrichs, Kevin Meyer, Scott Novak, and Elizabeth Kerttula.

review that the MRDC tram project underwent for consistency with the Alaska Coastal Management Program (ACMP) and the Juneau Coastal Management Program (JCMP). Amended Complaint at 83, ¶¶ 311-12. The initial stage of that review was done by the Division of Governmental Coordination (DGC), in the Office of Management and Budget. In March of 1995 DGC issued a proposed consistency determination which found that the tram project was consistent with the ACMP and JCMP. Amended Complaint at 83, ¶ 312.

Wilhelmsen petitioned the Coastal Policy Council (CPC) to review the proposed consistency determination. Amended Complaint at 83, ¶ 312. On April 19, 1995, the CPC held a hearing on the petition and determined that the DGC had fairly considered Wilhelmsen's comments during the review process. Amended Complaint at 85-86, ¶ 322. On April 27, 1995, the state issued its final consistency determination, which also found that the tram project was consistent with the ACMP and JCMP. On June 19, 1995, the CPC heard the remaining issues in Wilhelmsen's petition. State's Answer at ¶ 93. It is not clear from the record whether any final action on those issues was taken.

Wilhelmsen initiated this case on April 26, 1995 with a "complaint (Request) Temporary Restraining Order" which asked for a temporary restraining order and a declaratory judgment that defined the state's legal obligations when granting a permit. The state, DGC, and CPC were the only named defendants, and were not served with the complaint.

Following the denial of that temporary restraining order request, Wilhelmsen filed the instant amended complaint in October

1995. The state was served thirteen days later, and the individual state defendants did not begin to receive service of the complaint until March, 1996.

The state defendants argue that in their official capacity they enjoy absolute immunity from this suit and therefore should be dismissed as defendants. The court agrees that the individual state defendants should be dismissed, for the following reasons.

First, the federal and state supreme courts have squarely held that a damage suit against a state agent in his or her official capacity is treated as a suit against the state itself. Vest v. Schafer, 757 P.2d 588, 598-99 (Alaska 1988)(citing Kentucky v. Graham, 437 U.S. 159, 165-66 (1985)). A suit against the state is not permitted under 42 U.S.C. ¶ 1983. Vest, 757 P.2d at 599. For this reason, the court cannot entertain that portion of Wilhelmsen's § 1983 claim against the individual state defendants in their official capacity.

Second, the individual state defendants enjoy at least[12] qualified immunity

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[12] The state argues that when they hear a petition under AS 46.40.096, as they did here, the members of the Coastal Policy Council perform judicial acts, for which they enjoy absolute immunity, Butz v. Economou, 438 U.S. 478, 514-17 (1978) and that administrative agency attorneys when presenting cases perform prosecutorial acts and also enjoy absolute immunity. Id. It is not necessary to reach this issue, since the court determines that the individual state defendants prevail on the lesser standard of qualified immunity.

from being sued in their personal capacity. That immunity from personal liability applies if the individual's conduct does not violate clearly established constitutional or statutory rights about which a reasonable person would have known. Harlow v. Fitzgerald, 457 U.S. 800, 818 & n.30 (1982). "Whether an official may prevail in his qualified immunity defense depends upon the 'objective reasonableness of [his] conduct as measured by reference to clearly established law.'" Beard v. Baum, 796 P.2d 1344, 1351 (Alaska 1991) (quoting Davis v. Scherer, 468 U.S. 183, 191 (1984)). Thus, the court must: 1) identify the specific right allegedly violated, 2) determine whether that right was clearly established, and 3) determine whether a reasonable official would have believed his or her conduct was lawful. Hamilton v. Endell, 981 F.2d 1062, 1066 (9th Cir. 1992).

Wilhelmsen has not asserted any specific rights that were clearly established, and thus fails to defeat the individual state defendants' qualified immunity. The United States Supreme Court has said that the "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson v. Creighton, 483 U.S. 635, 640 (1987). The Anderson Court further stated:

> For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that clause (no matter how unclear it may be that the particular action is unclear it may be that the particular action

> is a violation) violates a clearly established right. Much the same could be said of any other constitutional or statutory violation. But if the test of "clearly established law" were to be applied at this level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of Harlow. Plaintiffs would be able to convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights.

Anderson, 483 U.S. at 639. Thus, assertion of only a generalized legal right, such as the right to due process or equal protection, is not sufficient to allege that the individual defendants violated a clearly established right.

Here, Wilhelmsen failed to allege a violation of any specific federal right or that the right was clearly established. He only asserts violations of "due process" and "equal protection," two generalized legal rules. Amended Complaint at ¶¶ 3, 395. Thus, the individual state defendants enjoy the qualified immunity necessary to shield them from Wilhelmsen's claims against them in their personal capacity.

Accordingly, the individual state defendants must be dismissed as defendants in both their official and their personal capacities, and all claims against them dismissed under Civil Rule 12(b)(6).

Dismissal Under Rules 8 and 12(b)(7)

a. Civil Rule 8

The state also argues that Wilhelmsen's Amended Complaint should be dismissed under Civil Rule 8 as being neither short nor plain. The court agrees. Wilhelmsen's Amended Complaint comprises four hundred forty three (443) paragraphs and one hundred fifteen (115) pages. There are attached to it seventy (70) exhibits comprising approximately five hundred (500) pages. It is not a "short and plain statement of the claim showing that the pleader is entitled to relief," as the rule requires. Rather, it appears more like a compendium of legal briefs, complete with exhibits, which argues a broad scope of issues, anticipates defenses and attempts to refute them, and contains many redundancies. It obfuscates the core issues and frustrates the defendants' and the court's ability to understand and the defendants' ability to respond to those core issues. Accordingly, the entire complaint is dismissed. This dismissal is without prejudice to Wilhelmsen's right to refile what the rule explicitly requires: a short, concise, and plain statement of his claim showing that he is entitled to relief.[13]

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[13] It should be noted that this relief, although provided at the request of only the state, inevitably affects the complaint which Wilhelmsen has brought against the CBJ: It is dismissed by this action of the court. Whether Wilhelmsen refiles against the CBJ in light of this court's observation in note 9 above (that the state statute which provides immunity to the individual CBJ defendants also appears to provide immunity to CBJ itself) is for the plaintiff to decide.

State of Alaska as Defendant

The state has moved for relief from the complaint against it as a governmental entity on the ground that this claim is essentially an appeal from adverse administrative action. State's Memorandum in Support of Motion To Dismiss, 22-24. The characterization appears to be correct. This court concludes, however, that the state is not entitled to a dismissal with prejudice, for the reason that the action (if considered as an administrative appeal) was not untimely.[14] A brief chronology of the principal events show why this is so.

One part of the CPC's final decision was issued on 27 April 1995. Possibly in anticipation of that decision, Wilhelmsen filed a request for temporary restraining order and complaint on 26 April 1995. That complaint named the State of Alaska as the defendant, and it gave notice of the plaintiff's intent to contest the CPC's action.

A second, separate part of the CPC's final decision was issued in June 1995. Wilhelmsen filed his amended complaint on 3 October 1995. Thus, even though Wilhelmsen filed his amended complaint more than thirty

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[14] No question has been raised regarding the timing of Wilhelmsen's appeal of the CPC's final agency action. But this court is loathe to dismiss a pro se litigant on the grounds that his civil complaint in reality should have been filed as an administrative appeal when the court's review of the procedural history suggests that, as an administrative appeal, it would have been timely. That is the case here.

days after the latter of the two final decisions, his initial complaint and request for TRO put the state on notice of his intention to challenge the agency action. Under these circumstances, Wilhelmsen should be allowed to file an appeal of the agency action under Alaska Rules of Appellate Procedure 601-12.

Conclusion

In conclusion, for the reasons set out above, the court GRANTS the motion to dismiss the claims against the individual CBJ defendants. The court GRANTS the motion to dismiss the claims against the individual state defendants. The court GRANTS the motion to strike the complaint because it is not a short and plain statement showing that the plaintiff is entitled to relief, without prejudice to plaintiff's right to re-file a complaint. However, any refiled civil complaint may only be brought against the CBJ for the reasons set out above. Finally, the court grants the motion to dismiss the complaint against the State, without prejudice to the right of the plaintiff to file an administrative appeal of the action of the state agency.

IT IS SO ORDERED.

DONE this 26th day of December, 1996.

"s/ Walter L. Carpeneti"

Walter L. Carpeneti
Superior Court Judge

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FIRST JUDICIAL DISTRICT AT JUNEAU

H. EVEREST WILHELMSEN, Plaintiff, vs MURRAY R. WALSH, BILL CORBUS, JOHAN DYBDAHL, ALBERT CLOUGH, GABRIALLE LAROCHE, ROSEMARY HAGEVIG, BOYD G. BROWNFIELD, CHUCK ACHBERGER, MIKE BAVARD, JOHN MACKINNON, RALPH KIBBY, STEVEN GILBERTSON, KEVIN G. MEYER, ROBIN HEINRICHS, BETH KERTTULA, DAVID WEINGARTNER, MARK PALESH, DONALD CHENHALL, KRISTEN BOMENGEN, SCOTT NOVAK, JOHN R. CORSO, BYRON MALLOTT, CHARLES EADDY, ELLEN FRITTS, DENNIS EGAN, DWIGHT PERKINS, CHARLES NORTHRIP, GRETCHEN KEISER, DIANE MAYER, STEPHEN WHITE, LAMAR COTTEN, STEPHEN SORENSEN, BETTY GLICK, KARI WESTLUND, TOM GARRETT, KIRBY DAY, CITY & BOROUGH OF JUNEAU, STATE OF ALASKA, Defendants.	FILED IN CHAMBERS STATE OF ALASKA FIRST JUDICIAL DISTRICT AT JUNEAU 12/26/96 BY: "s/ MA" Case No. 1JU-95-880 CI

ORDER

William A. Corbus, having moved for dismissal with prejudice of the complaint against him, and this court having considered the motion and any opposition thereto, it is hereby

ORDERED

1. The amended complaint in this action is dismissed with prejudice as to William A. Corbus or Bill Corbus.

2. The caption of this case shall be changed to delete all reference to "Bill Corbus."

~~3. William A. Corbus is hereby awarded~~ "s/ WLC" ~~($) in attorney's fees.~~ *

Dated: 26 Dec. 96

"s/ Walter L. Carpeneti"

Superior Court Judge

* Attorney's fees issues reserved for later litigation.

"s/ WLC"

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FIRST JUDICIAL DISTRICT AT JUNEAU

H. EVEREST WILHELMSEN, Plaintiff, vs MURRAY R. WALSH, et al., Defendants.	FILED IN CHAMBERS STATE OF ALASKA FIRST JUDICIAL DISTRICT AT JUNEAU BY: "s/ DH"

Case No. 1JU-95-880 CI

ORDER DENYING RECONSIDERATION

On 7 January 1997, Plaintiff Wilhelmsen asked this court to reconsider its 26 December 1996 order on several grounds, including the question of the individual liability of CBJ defendants. On 6 February 1997, the court agreed to reconsider the issue of the individual CBJ defendants being sued in their individual capacity, and invited a response. Those defendants filed a timely opposition to the motion for reconsideration.

The gist of Wilhelmsen's argument is that the individual defendants cannot be immune from suit because their acts were ultra vires, and because no immunity lies for intentional, knowing, and willful violations of constitutional rights.

The defendants respond by arguing that Wilhelmsen has not shown that their acts were anything but official in nature, as well they could not be. Voting, making public recommendations, and giving advice in public meetings, argue the defendants, cannot be undertaken except in the course of official performance. Thus, the defendants contend, they are entitled to the immunity which AS 09.65.070(d) provides.

Immunity under AS 09.65.070(d) is granted only for discretionary, official acts. Thus, there must be a determination that the defendants' acts were official and discretionary for them to enjoy the benefit of statutory immunity. The court has already made this determination, ordering on 26 December 1996 that the individual CBJ defendants be dismissed under AS 09.65.070(d) because their acts were official and discretionary in nature. Wilhelmsen, however, claims that the court did not recognize that the defendants were sued in an individual as well as on official capacity, and that there was no determination (and could be none) that there was immunity for acts committed in an individual capacity.

Having fully considered the arguments of both sides, the court denies reconsideration. Alaska Statute 09.65.070(d) provides immunity for official and discretionary acts. The court has already ruled that the individual defendants' acts were official and discretionary in nature. There is no reason to create an additional category beyond what is expressed in the statute. Further, the court agrees that the acts complained of (assembly and planning commissioners voting, members of an advisory committee making public recommendations to the planning commission,

staff members giving advice at public meetings and working on matters involving city property) can only have effect when the actors do the acts in their official capacities. Finally, the law recognizes that immunity exists regardless of the intent with which the act was done.[1]

Accordingly, for the reasons stated above and articulated in the individual defendants' response, the court declines to modify its decision of 26 December 1996 on reconsideration. The motion for reconsideration is denied.

IT IS SO ORDERED.

DONE this 20th day of March, 1997.

"s/ Walter L. Carpeneti"

Walter L. Carpeneti
Superior Court Judge

[1] Wilhelmsen argues that the immunity should not apply because the defendants' acts were, among other things, intentional, knowing, and willful. The defendants correctly argue that these accusations fail to alter the legal analysis. In Breck v. Ulmer, 745 P.2d 66 (Alaska 1987), the supreme court noted that "[a]s long as the actions were, on their face, within the scope of [their] authority, the fact that . . . they were performed with unlawful intent is irrelevant." Id. at 72 (quoting Aspen Exploration Corp. v. Sheffield, 739 P.2d 150, 154 (Alaska 1987). The critical question is whether the individual defendants were vested with the authority to lease the land in question. They were, for the reasons set out in Concerned Citizens of Juneau v. City and Borough of Juneau, et al., 1JU-95-447 CI, 18 May 1995.

THE SUPREME COURT OF THE STATE OF ALASKA

H. EVEREST WILHELMSEN, Appellant, v. MURRAY R. WALSH, BILL CORBUS, JOHAN DYBDAHL, ALBERT CLOUGH, GABRIELLE LAROCHE, ROSEMARY HAGEVIG, BOYD G. BROWNFIELD, CHUCK ACHBERGER, MIKE BAVARD, JOHN MACKINNON, RALPH KIBBY, STEVEN GILBERTSON, KEVIN G. MEYER, ROBIN HEINRICHS, BETH KERTTULA, DAVID WEINGARTNER, MARK PALESH, DONALD CHENHALL, KRISTEN BOMENGEN, SCOTT NOVAK, JOHN R. CORSO, BYRON MALLOTT, CHARLES EADDY, ELLEN FRITTS, DENNIS EGAN, DWIGHT PERKINS, CHARLES NORTHRIP, GRETCHEN KEISER, DIANE MAYER, STEPHEN WHITE, LAMAR COTTEN, STEPHEN SORENSEN, BETTY GLICK, KARI WESTLUND, TOM GARRETT, KIRBY DAY, CITY & BOROUGH OF JUNEAU, and STATE OF ALASKA, Appellees.	Supreme Court No. S-8120 Superior Court No. 1JU-95-880 CI

MEMORANDUM OPINION AND JUDGMENT*

[No. 0924 - May 26, 1999]

Appeal from the Superior Court of the State of Alaska, First Judicial District, Juneau
Walter L. Carpeneti, Judge

*Entered pursuant to Appellate Rule 214.

Appearances: H. Everest Wilhelmsen, pro se, Juneau. Eric A. Kueffner and Leon T. Vance, Faulkner, Banfield, Doogan & Holmes, Juneau, for Appellees City and Borough of Juneau, and City and Borough of Juneau employees and officials. Steven C. Weaver, Assistant Attorney General, and Bruce M. Botelho, Attorney General, Juneau, for State of Alaska and State of Alaska employees and officials.

Before: Matthews, Chief Justice, Compton, Eastaugh, Fabe, and Bryner, Justices.

1. H. Everest Wilhelmsen sued the City and Borough of Juneau (CBJ), the State of Alaska, and several CBJ and State officials. His amended complaint was 115 pages long. Wilhelmsen attached to the amended complaint seventy exhibits of some 300 pages. Upon motion, the superior court dismissed with prejudice the claims against the individual CBJ defendants and the individual State defendants on immunity grounds. The superior court also dismissed the entire complaint because it was not a short and plain statement demonstrating that Wilhelmsen was entitled to relief; the court gave Wilhelmsen an opportunity to refile a complaint against the State without prejudice to Wilhelmsen's right to file an administrative appeal of the action of the State agency. Wilhelmsen appeals.

2. Wilhelmsen argues that the superior court erroneously dismissed his

claims against the individual CBJ and State defendants on immunity grounds. After considering the briefs and the parties' oral arguments, we ordered Wilhelmsen to file a supplemental brief identifying the specific torts he alleges each appellee committed and the legal basis for claiming that the appellees owed him an actionable duty with respect to each of those identified torts. We gave the appellees an opportunity to file a supplemental brief in response, and Wilhelmsen an opportunity to file a supplemental brief on these issues. The parties filed supplemental briefs. Having considered those briefs, we conclude that Wilhelmsen has failed to identify any actionable duty running in his favor against any of the individual CBJ and State employees. We therefore need not consider whether doctrines of immunity protected the individual employees from suit.

3. We next consider, and reject, Wilhelmsen's argument that the superior court erred in dismissing the amended complaint without prejudice to refiling a complaint complying with Alaska Civil Rule 8. The amended complaint patently fails to comply with the requirements of Rule 8 because it is not a short and plain statement showing that Wilhelmsen is entitled to relief.

4. We next consider, and reject, Wilhelmsen's argument that the superior court erred in holding that the amended complaint was also deficient because it failed to noin an indispensable party, Mt. Roberts Development Corporation. The superior court did not err in concluding that the entity to which the lease was issued is an indispensable party to a suit seeking permanent injunction of that lease.

5. We next consider, and reject, Wilhelmsen's claim that it was error to require Wilhelmsen to maintain his action against the State as an administrative appeal.

6. We find no merit in any of Wilhelmsen's other arguments.

7. The superior court orders of December 26, 1996, are AFFIRMED.

THE SUPREME COURT OF THE STATE OF ALASKA

H. EVEREST WILHELMSEN, Appellant,	)	Supreme Court No. S-08120
v.	)	Trial Court No. 1JU-95 880 CI
MURRAY WALSH, et al., Appellees.	)	

ORDER

Petition for Rehearing
Date of Order: 6/24/99

Before: Matthews, Chief Justice, Eastaugh, Fabe, and Bryner, Justices, and Compton, Senior Justice, Pro Tem[1] [Carpeneti, Justice, not participating]

On consideration of the Petition filed on 6/7/99.

IT IS ORDERED:

The Petition for Rehearing is DENIED.

Entered by the direction of the court.

Clerk of the Appellate Courts

"s/ Marilyn May"

Marilyn May

[1] Sitting by assignment made under Article IV, Section 11 of the Alaska Constitution and Administrative Rule 23(a).

DEFINITION of "enforceable policy"

§ 304 (16 U.S.C. § 1453). Definitions

For purposes of this chapter -

(6a) The term "enforceable policy" means State policies which are legally binding through constitutional provisions, laws, - regulations, land use plans, ordinances, or judicial or administrative decisions, by which a State exerts control over private and public land and water uses and natural resources in the coastal zone.

VIOLATED POLICIES

Coastal Zone Management Act (As amended by P.L. 101-508, November 1990, and P.L. 104-150, the Coastal Zone Protection Act of 1996)

§ 303 (16 U.S.C. § 1452). Congressional Declaration of Policy

The Congress finds and declares that it is the national policy -

(1) to preserve, protect, develop, and where possible to restore or enhance, the resources of the Nation's coastal zone for this and succeeding generations.

(4) to encourage the participation and cooperation of the public, state and local governments, and interstate and other regional agencies, as well as the Federal agencies having programs affecting the coastal zone, in carrying out the purposes of this chapter;

VIOLATED POLICIES

"Enforceable Policies"

Constitution of Alaska, Article VIII, Section 10 states:

No disposals or leases of state lands, or interests therein, shall be made without prior public notice and other safeguards of the public interest as may be prescribed by law.

Alaska Statute 46.40.100(a) Compliance and enforcement states:

Municipalities and state agencies shall administer land and water use regulations or controls in conformity with district coastal management programs approved by the council and the legislature and in effect.

Alaska Statute 46.40.100(d) states:

Except when a petition has been filed under AS 46.40.096(e), in determining whether a state agency is complying with a district coastal management program with respect to its exercise of regulation or control of the resources within the coastal area, the council shall find in favor of the agency if

(1) the use or activity for which the permit, license, or approval is granted is consistent with the district coastal management program and regulations adopted under it; and

(2) the use or activity for which the permit, license, or approval is granted is consistent with requirements imposed by state statute, regulation, or local ordinance applicable to the use or activity.

What is a "Hard Look?"

The Coastal Policy Council's decision will be to take a "hard look" at the action of the coordinating agency. This means that the CPC will determine whether the coordinating agency considered all relevant factors and articulated a rational connection between the facts found and the coastal consistency determination made.

> An agency's failure to consider an important factor will render its decision arbitrary. Our role is to ensure that the agency has "taken a 'hard look' at the salient problems" and has "genuinely engaged in reasoned decision making."

Trustees for Alaska v. State, 865 P.2d 745, (Alaska 1993); Alaska Survival v. State Department of Natural Resources, 723 P.2d 1281 (Alaska 1986).

Alaska Statute 49.40.090(b)

A coastal resource district which has and exercises zoning or other controls on the use of resources within the coastal area shall implement its district coastal management program. Implementation shall be in accordance with the comprehensive use plan or the statement of needs, policies, objectives and standards adopted by the district.

City and Borough of Juneau, Comprehensive Plan, Policy 54

Evaluate all ordinances, plans and public programs to insure their consistency with the comprehensive plan and coastal management program.

Juneau Coastal Management Program, Chapter X IMPLEMENTATION, Section 3

The same statutes and regulations of the Alaska Coastal Management Program, which require consistency of state agency actions with local coastal programs, apply in equal measure to the actions of the district itself. A local government which obtains Coastal Policy Council approval of a program may not deviate from the requirements of the program at whim.

Juneau Coastal Management Program Chapter X, CONSISTENCY DECISIONS, Section 3A

Section 46.40.100 of the Alaska Coastal Management Act establishes the responsibility of state agencies and the City and Borough of Juneau itself to act "in conformity" with approved district coastal management programs.

Juneau Coastal Management Program, Chapter X, IMPLEMENTATION, Section 4

The City and Borough of Juneau, in its role as a regulator or as proprietor, has sufficient authority to implement this program at the local level. The City and Borough of Juneau will use routine coordination among city officials to assure that other authorities and activities of the City and Borough of Juneau are operated in harmony with the coastal program. The principal authorities are:

1. The CBJ Building Code, CBJ Title 19, Chapter 3 through Chapter 26;
2. The CBJ Subdivision Code, CBJ Title 49, Chapter 30 through Chapter 50;
3. The CBJ Zoning Code, CBJ Title 49, Chapter 5 through Chapter 50;

4. The CBJ Land Management, CBJ Title 53, Chapter 4 through 20;

5. The CBJ Historic District Code, CBJ Title 49, Chapter 25;

6. The CBJ Design Review Ordinance, CBJ Title 49, Chapter 25;

7. The Capital Improvements Program;

8. The CBJ Consistency Review Process operating by the State of Alaska (6 AAC 50);

The method as indicated, is to add coastal management consideration to each of these processes at appropriate points.

City and Borough of Juneau Ordinance 49.05.100 PURPOSE AND INTENT.

The several purposes of this title are:

(1) To achieve the goals and objectives, and implement the policies, of the Juneau comprehensive plan, and coastal management program;

(2) To ensure that future growth and development in the city and borough is in accord with the values of its residents;

(3) To identify and secure, for present and future residents, the beneficial impacts of growth while minimizing the negative impacts;

(4) To ensure that future growth is of the appropriate type, design, and location, and is served by a proper range of public services and facilities such as water, sewage, and electrical distribution systems, transporation, schools, parks and other public requirements, and in general to promote public health, safety, and general welfare;

(5) To provide adequate open space for light and air; and

(6) To recognize the economic value of land and encourage its proper and beneficial use.

City and Borough of Juneau Ordinance 49.10.170(c)

The report and recommendation of the commission shall be based upon the provisions of this title, the comprehensive plan, and the capital improvements program.

City and Borough of Juneau Ordinance 53.20.030(2)(E)

With every application, except the application for general use purpose, the applicant shall submit a development plan showing and stating:

(E) Whether intended use complies with the zoning title and comprehensive plan of the city and borough.

City and Borough of Juneau Ordinance 53.20.020

No lands may be leased which have not at least thirty days before award or execution of a lease, been declared by the assembly by resolution to be available for leasing or identified in the approved land management plan for disposal by competitive bid leasing in the current year.

City and Borough of Juneau Ordinance 49.75.410

The commission shall initiate an amendment to this title by holding a public hearing to consider whether it should

recommend such amendment to the assembly. The director shall provide at least ten days public notice of the hearing.

City and Borough of Juneau Ordinance 49.10.170(d)

The commission shall make recommendations to the assembly on all proposed zonings and rezonings, indicating compliance with the provisions of this title and the comprehensive plan.

City and Borough of Juneau Ordinance 53.09.260

Upon review by the planning commission and authorization by the assembly by ordinance, the manager may commence negotiations for the lease.

City and Borough of Juneau Ordinance 53.20.190(17)

In addition to other applicable provisions of this code, the terms, conditions and covenants following as subsections (1) through (23) of this section shall govern all leases made under the provisions of this chapter and shall be incorporated in all such leases of land made or issued by the city and borough unless the assembly by resolution provides otherwise as to a specific lease, and are hereby incorporated as though set out in full in the lease.

(17) The lessee shall comply with all regulations, rules, and the code of the city and borough of Juneau, and with all state and federal regulations, rules and laws as the code or any such rules, regulations or laws may affect the activity upon or associated with the leased land.